No. 89-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,

Petitioner

v.

STATE BAR OF NEVADA,

Respondent

ON WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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THE INTEREST OF THE AMICUS CURIAE

Goal V of the American Bar Association ("ABA") is "To Assure the Highest Standards of Professional Competence and Ethical Conduct." Its efforts to achieve that goal have earned the ABA recognition as a leader in the development and promotion of ethical standards for the legal profession. It promulgated the Canons of Ethics in 1908; The Model Code of Professional Responsibility in 1969; and the Model Rules of Professional Conduct in 1983. Presently the Model Rules have been adopted with amendments in thirty-five states and the District of Columbia; have been recommended to the highest courts of three other states for adoption; and are presently under active study in three additional jurisdictions.

Rule 177 adopted by the Nevada Supreme Court is identical to Rule 3.6 of the Model Rules of Professional Conduct.[1] The ABA submits that these Rules strike a balance between important First and Sixth Amendment rights. This Court's decision on the constitutionality of Nevada Rule 177 will profoundly impact the standards governing extrajudicial statements by lawyers, with consequent effects upon the administration of justice. The ABA is therefore vitally interested in the issues presented in this case.[2]

SUMMARY OF ARGUMENT

NEVADA DISCIPLINARY RULE 177 IS CONSTITUTIONAL ON ITS FACE AND BALANCES LEGITIMATE INTERESTS IN FREE SPEECH AND FAIR TRIAL. AS OFFICERS OF THE COURT, LAWYERS HAVE TRADITIONALLY BEEN SUBJECT TO LIMITATIONS UPON THEIR FIRST AMENDMENT RIGHTS NOT APPLICABLE TO OTHER PERSONS. THE RULE AT ISSUE IS NEITHER VAGUE NOR OVERBROAD AND PROPERLY ARTICULATES THE BOUNDARIES OF ACCEPTABLE EXTRAJUDICIAL STATEMENTS BY LAWYERS.

ARGUMENT

I. A LAWYER'S ROLE AS OFFICER OF THE COURT AND DIRECT PARTICIPANT IN A JUDICIAL PROCEEDING PROPERLY SUBJECTS THE LAWYER TO RESTRICTIONS UPON THE EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

[1] Rule 3.6 has been adopted unchanged by 18 states, and with minor changes by 12 states. In 5 states and in the District of Columbia, it was adopted with substantial revision.

[2] The ABA limits its argument to the facial constitutionality of the Rule at issue. It takes no position on the application of the Rule to the particular facts of this case.

A. Traditional ethical obligations of lawyers as officers of the court impose a variety of limitations upon lawyers' First Amendment rights not applicable to other persons.

The essential role of the lawyer in the administration of justice carries with it unique obligations that do not apply to other citizens. *Theard v. United States*, 354 U.S. 278, 281 (1957); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.). One such traditional obligation imposes upon the lawyer certain restrictions upon the freedom to speak (or not to speak) under the First Amendment to the United States Constitution. This Court has acknowledged the existence and appropriateness of such restrictions. In *In re Sawyer*, this Court stated that "[O]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In Re Sawyer*, 360 U.S. 622, 646 (1959). Addressing lawyers' relinquishment of certain rights as members of a regulated profession and as officers of the court, this Court stated in *In re Snyder*, 472 U.S. 634, 644-645 (1985), that "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice."

The states have similarly acknowledged this principle. For example, in *In re Woodward*, 300 S.W.2d 385, 393-394, (Mo. 1957), the court held that "[a] layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics." *See also In re Frerichs*, 238 N.W.2d 764 (Iowa 1976) (lawyer,

acting in a professional capacity, may have fewer rights of free speech than would a private citizen); *In re Johnson*, 240 Kan. 334, 729 P.2d 1175, 1179 (1986) (one of the purposes of disciplinary action is to enforce "honorable conduct on the part of the court's own officers.")

In order to fully appreciate the lawyer's special duties with respect to extrajudicial statements it is useful to consider certain parallel restrictions imposed upon the lawyer that also restrict the lawyer's first amendment rights. Understanding the lawyer's special obligations as an officer of the court where such other restrictions apply sheds helpful light on the rationale that underlies Nevada Rule 177.

A lawyer's first amendments rights are limited, for example, when the lawyer is obligated to maintain the confidentiality of information revealed by a client. Such restriction serves to instill confidence in the lawyer-client relationship, and to insure candid disclosures to lawyers by their clients, thereby insuring the proper administration of justice by affording the lawyer the opportunity to remonstrate with the client who may intend wrongdoing.

Lawyers' speech rights are also limited by traditional conflict-of-interest provisions that prohibit a lawyer from undertaking representations adverse to those of the lawyer's present or former clients, thereby guaranteeing zealous advocacy and instilling in clients a sense of the loyalty of their lawyers, without which the justice system could not function.

Lawyers' freedom of speech is further restricted by the traditional prohibition against acting as witnesses in their clients' behalf, so as to not subject themselves to possible impeachment and thereby undermine the effectiveness of the representation they provide.

In addition, lawyers' speech is restricted by traditional prohibitions against contact with jurors both during and after an adjudicative proceeding, a measure developed to assure the finality of verdicts and to protect jurors from potential harassment.

Finally as this Court's line of recent cases on the subject of lawyer advertising reveals, limitations of lawyers' first amendment speech rights in that context may be appropriately tailored to protect the public from coercion, harassment and duress. *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

All of these limitations arise out of a lawyer's role as advocate and officer of the court, and are thus predicated on a difference between the lawyer, *qua* lawyer, and other persons, such as members of the press. All of these restrictions are directed toward the proper functioning of the judicial system.

B. A rule prohibiting extrajudicial statements having a substantial likelihood of materially prejudicing the outcome of an adjudicative proceeding is a legitimate restriction upon lawyers' first amendment rights, carefully tailored to protect systemic values in the administration of justice.

A rule prohibiting a lawyer from making extrajudicial statements that have a substantial likelihood of materially prejudicing the outcome of an adjudicative proceeding is designed to assure the proper functioning of the judicial system by insuring fair trials. The special obligation imposed upon lawyers in this context, as distinct from other parties, to assist the justice system in insuring the fair outcome of an adjudicative proceeding by complying with rules that limit their extrajudicial statements is constitutional.

The special restriction imposed by rules such as Nevada Rule 177 upon a lawyer's extrajudicial speech, preventing the lawyer from becoming the actual source of prejudicial statements, is justified by at least two principles. The first of these is that the special training a lawyer possesses enables the lawyer to better understand the implications of certain speech for the eventual outcome of a proceeding. It would be an anomaly in the law of professional responsibility for the ethical rules governing lawyer conduct to hold that a lawyer having full understanding of the harms inherent in certain types of extrajudicial statements should nonetheless be authorized to be the initiator of those harms.

The second principle supporting the obligation imposed upon lawyers in this arena of speech is that the special privilege granted to them to obtain or discover otherwise unavailable information meant for use at trial carries with it a concomitant duty not to misuse such information to prejudice the outcome of a proceeding. To liberalize the restrictions on the use of the discovery process would necessarily result in a need to foreclose the process entirely. This danger was discussed in *In re Halkin*, 598 F.2d 176, 194, n. 42 (D.C. Cir. 1979), where the court noted that

> prejudice to a fair trial is not the only danger posed by unfettered dissemination of discovery materials. Inevitably, the possibility of dissemination will lessen (to some degree) judges' willingness to order liberal discovery, and inhibit willing compliance with discovery requests. To maximize the full flow of discovery would require nothing short of a blanket prohibition on disclosure. . . . such a rule would clearly cut too deeply into First Amendment freedoms . . .

The ABA further submits that consideration of the constitutional challenge to Nevada Rule 177 should not, however, focus narrowly or exclusively upon the fair outcome of a trial, as though this were the sole value to be weighed against a lawyer's right of free speech. An argument that lawyers cannot be subjected to restrictions greater than those imposed upon members of the press or parties not directly involved in an adjudicative proceeding fails to take into account the lawyer's special status and ignores the body of law establishing the wide variety of obligations that attend such status. The state's amply recognized need to preserve certain fundamental or systemic values within the justice system requires a different analysis of the problem.

Scrutiny of limitations on lawyer speech, in a context broader than that of trial outcome alone, is exemplified in *U.S. v. Simon*, 664 F.Supp. 780, 789, (S.D.N.Y. 1987), *affirmed sub nom. Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir.), *cert. denied sub nom. Dow Jones & Co., Inc. v. Simon*, U.S. 946 (1988), where members of the communications media had applied to vacate an order restraining pretrial statements by defense lawyers and prosecutors. There the court stated that "[I]n addition to its constitutional responsibility in protecting the right to a fair trial on the part of individual defendants, the Court must also concern itself with protecting systemic values considered indispensable to the fair administration of justice." The ABA submits that this Court should scrutinize Nevada Rule 177, its objective and effect, in a similar manner.

II. The Historical Development of the Rule at Issue Here Reflects the Careful Balancing of Competing State Interests and Results in an Ethical Rule That Legitimately Safeguards Critical Values of the System for Administering Justice.

The development of limitations of speech in this area have traditionally been the responsibility of the bar. Although the propriety of extrajudicial statements by lawyers was addressed as early as 1908 in Canon 20 of the ABA's Canons of Ethics, it is in the last quarter-century that such statements have been addressed by a series of rules developed in the context of this Court's holdings on the subject of the permissibility of limitations on first amendment rights. The history of the development of these most recent rules, when set alongside a chronology of this Court's decisions on the subject, provides help in understanding why Rule 3.6, from which Nevada Rule 177 is derived, constitutes a legitimate restriction on lawyer speech.

The formulation of Rule 3.6 derives from the recommendations of the Advisory Committee on Fair Trial and Free Press ("Advisory Committee"), created in 1964 by the ABA upon the recommendation of the Warren Commission, the commission appointed to investigate the assassination of President Kennedy. The Warren Commission's report on the assassination concluded with the recommendation that

> representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.

Report of the Warren Commission, quoted in Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417 (1966).

The group of prominent lawyers and judges who served on the Advisory Committee developed the ABA *Standards Relating to Fair Trial and Free Press* ("Fair Trial — Free Press Standards"), the first comprehensive guidelines relating to disclosure of information concerning criminal proceedings. As was later reported to the ABA by the Standing Committee on Association Communications, the study was supported by field surveys and consultations with news media organizations and law enforcement officials. The Standards defined what had never been defined before: the specific types of nonprejudicial information that could be released for publication to meet the requirements of press freedom and inform the public, and the types of information that should not be released if prejudice is to be avoided in subsequent trials.

These standards were relied upon by the ABA in 1968 in formulating the Model Code of Professional Responsibility rule relating to extrajudicial statements by lawyers. The rule barred lawyers' extrajudicial comments, in criminal cases, that were "reasonably likely to interfere with a fair trial." DR 7-107(D). The need for and appropriateness of such a rule had been emphatically identified by tais Court two years earlier in *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1966):

> Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity . . . The Courts must take such

> steps by rule and regulation that will protect their processes from prejudicial outside influences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

At the time of the ABA's actions, the Federal judiciary was also studying the issue of what measures might be taken by the federal courts to meet the problem of prejudicial publicity in connection with criminal cases. In 1966, the Judicial Conference of the United States authorized a Special Subcommittee to Implement *Sheppard v. Maxwell* to proceed, under the aegis of the Committee on the Operation of the Jury System, with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. *See Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 404-407 (1968) ("Kaufman Report").

While the Kaufman Report's recommendations were more liberal than those of the ABA Advisory Committee with respect to the press, its recommendations about public discussion by attorneys in pending criminal cases were identical to the Advisory Committee standards. Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417, 425. The Kaufman Report specifically relied upon and quoted *Sheppard v. Maxwell* for authority in proscribing these statements. District courts, responding to the recommendations of the Kaufman Report, proceeded to enact local rules incorporating these standards.

The "reasonable likelihood" of prejudicing a fair trial test was thus used by a majority of courts, state and federal, in the years following *Sheppard*.[3]

Ten years after the Advisory Committee Report, the Fair Trial-Free Press Standards were amended, and the "reasonable likelihood" test was changed to a "clear and present

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[3] *See, e.g., United States v. Tijerina*, 412 F.2d 661, 666-67 (4th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *United States v. Simon*, 664 F. Supp. 780, 791 (S.D.N.Y. 1987) (endorsing the "reasonable likelihood" test as "more realistic" than a "clear and present danger" or "serious and imminent threat" test), *aff'd sub nom. Application of Dow Jones & Co., Inc.*, 842 F.2d 603, *cert. denied sub nom. Dow Jones & Co., Inc. v. Simon*, 488 U.S. 946 (1988); *Society of Professional Journalists v. Martin*, 431 F. Supp. 1182, 1188-89 (D.S.C.) (approving "reasonable likelihood" standard although finding, on the facts, a "substantial likelihood" of prejudice to fair trial rights), *aff'd. as modified on other grounds*, 556 F. 2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *National Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 292, 501 N.Y.S.2d 405, 408 (2d Dept. 1986) (" 'reasonable likelihood' " of a "serious threat to a defendant's right to a fair trial"). *See also Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *In re Russell*, 726 F.2d 1007, 1009-11 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984); *Application of National Broadcasting Company, Inc.*, 635 F.2d 945, 951 (2d Cir. 1980); Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on Pretrial Publicity* at 5 (April 1987). *But cf. Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

danger" test. Standard 8-1.1, (as amended, 1978) (2d ed. 1980 Supp. 1986). The change "assign[ed] greater weight to the attorney's right under the first amendment to make public, extrajudicial statements about criminal investigations or litigation. [It] was prompted by a consideration of several judicial decisions, the most noteworthy of which is *Chicago Council of Lawyers v. Bauer*." *ABA Standards for Criminal Justice*, at 8-5 (2d ed. 1980).

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised Fair Trial-Free Press Standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated. While acknowledging the recently amended Fair Trail-Free Press Standard, and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), the drafters stopped short adopting the "clear and present danger" test and endorsed instead a "substantial likelihood of material prejudice" as the appropriate test. The drafters felt that the "substantial likelihood test," rather than the "clear and present danger " test, struck the proper balance between fair trial and lawyers' free speech. The ABA submits that this balanced standard, contained in Rule 3.6, withstands constitutional scrutiny.

III. Alternative Means of Protecting Against the Harm of Prejudicial Extrajudicial Statements of Lawyers are Less Effective and Desirable Than Is The Rule at Issue Here.

The prohibitions imposed by a rule such as Nevada Rule 177 have been characterized as more restrictive than alternative methods that might be available to address and remedy the harm done by prejudicial extrajudicial statements of lawyers. However, alternative methods of repairing such harm suffer from several shortcomings: they are triggered

only after potentially harmful conduct has occurred, but do not prevent it; they impose significant administrative, financial and practical burdens upon the judicial system; and they are unlikely to be an effective means of eradicating the harms they address. These methods include changing trial venue, sequestering jury members, conducting individual voir dire of the jury venire, and instructing jurors to disregard inadmissible evidence contained in extrajudicial statements.

Each of these methods is likely to be inadequate. A change of trial venue, given the complexity and current cost of trials, imposes an enormous and unnecessary burden upon the judicial system and incurs increased costs and inconvenience to parties, witnesses and counsel. Sequestering of jurors not only incurs substantial additional costs, but significantly limits the pool of those available to serve, as well. Reliance upon jury voir dire and court instructions to the jury does not protect against the significant risk that extensive amounts of pretrial publicity, intended to influence the jury, will result in decisions relying, even if subconsciously, on inadmissible evidence. And even where the actual fairness of the outcome of the trial has not been prejudiced, as perhaps evidenced by the acquittal of a defendant, the interest in the apparent fairness of the judicial system requires sensitivity to the threat to a defendant's reputation that may linger even after acquittal.

Evidencing its concern about such a threat, the Court in *U.S. v. Simon*, noted

> For example, following his acquittal, Labor Secretary Donovan asked rhetorically where he might go to have his reputation restored to him. . . . Under circumstances similar to those confronted by Mr. Donovan, lingering notions about an acquitted defendant's character, and even his innocence may

> remain embedded in the public's memory. Apart from the impact these notions may have upon an acquitted defendant's life, employment prospects and stature in the community, such residual effects help to undermine public confidence in the judicial system.

U.S. v. Simon, 664 F.Supp. at 789.

The ABA submits that the proper administration of justice and the state interest in assuring the fair outcome of judicial proceedings are better served by requiring that lawyers adhere to a rule that provides an effective deterrent to specific harms rather than, through lack of regulation, resorting to measures to undo those harms after they occur and disciplining lawyers who were responsible for creating them.

IV. Model Rule 3.6 and Nevada Rule 177 Are Neither Vague Nor Overbroad and Provide Clear Instruction to Lawyers Contemplating Extrajudicial Statements.

The Nevada Rule identifies types of information, in language familiar to the lawyers to whom it is addressed, which, if publicly disseminated prior to trial, have a substantial likelihood of materially prejudicing an adjudicative proceeding. The Rule has three components, each of which provides guidance to lawyers who contemplate making extrajudicial statements.

The first component identifies two elements that must be present before any extrajudicial statement is proscribed: the statement must be substantially likely to create prejudice, and that prejudice must be material.

The second component of the Rule identifies categories of information that would ordinarily have a substantial likelihood of materially prejudicing the outcome of a judicial proceeding. These examples alert the lawyer to the subject matter of extrajudicial statements that trigger concern.

The third component of the Rule identifies categories of information that a lawyer may publicly disclose, in short, a "safe harbor" provision. That, too, provides guidance by identifying statements that will not subject the lawyer to disciplinary action.

The need for a rule of this sort was addressed by the court in *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250, stating that

> . . . specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a "serious and imminent threat" of interference with the fair administration of justice.

CONCLUSION

The American Bar Association respectfully submits that the Rule in question is facially constitutional.

Respectfully submitted,

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